Nos. 86-1373 and 86-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK, *et al.*,
Petitioners,

v.

LEE M. THOMAS, Administrator,
United States Environmental
Protection Agency,
Respondent.

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, *et al.*,
Petitioners,

v.

LEE M. THOMAS, Administrator,
United States Environmental
Protection Agency,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR INDUSTRY AND STATE RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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BRIEF FOR INDUSTRY AND STATE RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

These cases involve a decision of the United States Court of Appeals for the District of Columbia Circuit, written by Judge Scalia, which is reported at 802 F.2d 1443 (D.C. Cir. 1986), and which appears in the appen-

dices to the petitions for certiorari. New York, *et al.*, and Ontario, *et al.*, seek to have this Court review the correctness of the lower court's decision. This brief in opposition to the petitions for certiorari is filed on behalf of Alabama Power Co., *et al.*,[1] the National Coal Association, and the States of Ohio, West Virginia, and Kentucky.[2]

RESTATEMENT OF QUESTION PRESENTED

Both the New York and Ontario petitions for certiorari present one basic issue:

> Whether the Administrator of the Environmental Protection Agency must adopt a rule in accordance with the Administrative Procedure Act if he wishes to force the Agency to undertake specific, future regulatory action.

STATEMENT OF THE CASE

The petitions for certiorari filed by New York and Ontario address one of the more hotly disputed political issues of the day—acid deposition.[3] During the past seven years, New York and others have repeatedly asked Congress to enact costly emissions control legislation to

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[1] Alabama Power Co., *et al.* is comprised of 62 electric utility companies, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. A complete list of the companies that comprise Alabama Power Co., *et al.*, along with a listing of parent companies, subsidiaries, and affiliates, is contained in the appendix to this brief, in accordance with Rule 28.1 of this Court.

[2] Respondents the States of Ohio, West Virginia, and Kentucky participated separately in the proceeding below. While they have joined in this brief in opposition in order to avoid duplication of argument, they reserve the right to file an independent brief on the merits should certiorari be granted.

[3] "Acid rain" or "acid deposition" refers to the wet (e.g., rain and snow) or dry (e.g., dust settling) deposition of acidic air pollutants.

address "acid deposition." Given scientific uncertainty[4] and the high costs of proposed control measures (which would add billions of dollars annually to the emission control expenditures already required by the Clean Air Act),[5] Congress has considered and rejected since 1980 over 30 bills designed to impose additional controls on potential acid deposition-related pollutants.[6]

Instead of enacting legislation requiring immediate emission controls, Congress responded to requests for legislation by enacting the National Acid Precipitation

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[4] *See, e.g., Review of the Federal Government's Research Program on the Causes and Effects of Acid Rain*, 99th Cong., 1st Sess. 11, 14-15 (1985) (testimony of Lee M. Thomas, Administrator, U.S. EPA) ("scientific uncertainty [surrounding acid deposition] . . . is probably greater than any of the uncertainties I deal with in decisions I make related to environmental risk. . . . The reduction of that uncertainty so we can have some basic decision rationale is the purpose for our research program as it relates to acid rain."); *Acid Rain, 1984: Hearings Before the Senate Committee on Environment and Public Works*, 98th Cong., 2d Sess. 9 (1984) (testimony of William D. Ruckelshaus, Administrator, U.S. EPA) ("before launching the country on an expensive and potentially divisive control program, we feel we need more scientific information.").

[5] The estimated costs of proposed acid deposition control legislation have ranged from $2.5 to $22 billion *per year* levelized over twenty years. *See, e.g.*, Temple, Barker & Sloane, Inc., Economic Evaluation of S.300, prepared for Edison Electric Institute (Mar. 1987) ($16.3 to $21 billion per year); Office of Technology Assessment Oceans and Environment Program Staff Paper, An Analysis of H.R. 4567: the "Acid Deposition Control Act of 1986" (July 29, 1986) ($2.7 billion to $3.0 billion per year to meet sulfur dioxide controls). *Cf. How Much for Acid Rain?*, The Washington Post, March 22, 1987, at C-6 ("with the cost of controlling air pollution already over $30 billion a year, how much more should the country spend on it—and is acid rain necessarily the top priority?").

[6] *See, e.g.*, S. 3041, 97th Cong., 2d Sess. (1982); H.R. 3251, 3400, 4404, 98th Cong., 1st Sess. (1983); S. 768, 98th Cong., 1st Sess. (1983); H.R. 5370, 98th Cong., 2d Sess. (1984); S. 2215, 98th Cong., 2d Sess. (1984); H.R. 2679, 99th Cong., 1st Sess. (1985); S. 52, 99th Cong., 1st Sess. (1985); H.R. 4567, 99th Cong., 2d Sess. (1986).

Assessment Program (NAPAP).[7] This legislation created an extensive federal research program to resolve scientific uncertainties regarding, *inter alia*, the sources and effects of acid deposition.[8] The research, to be completed by 1990, will assist Congress in deciding whether additional controls are needed and, if so, the nature of those controls.

Given the scientific uncertainty and the enormous costs of a control program, President Reagan and three EPA Administrators (Ann Gorsuch Burford, William D. Ruckelshaus, and Lee M. Thomas) have all expressed support for Congress' decision to accelerate research and to reject legislation requiring the immediate imposition of new control measures.[9] Over $200 million has been spent since 1982 on the accelerated federal research effort.[10]

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[7] 42 U.S.C. §§ 8901-8905 (1982).

[8] *See* Statement of Senator Daniel P. Moynihan, 126 Cong. Rec. S7432 (daily ed. June 19, 1980) (NAPAP is "[d]esigned to be the legislative underpinning of the acid rain program initiated by President Carter last August [1979]."); *see also* Memorandum of President Carter (Aug. 2, 1979), *reprinted in* 126 Cong. Rec. H5694 (daily ed. June 26, 1980) ("our knowledge of possible effects and specific causes of acid rain are inadequate for determining what kinds of controls would best mitigate the problems of acid rain. . . . [Therefore] we must establish a comprehensive federal acid rain research program.").

[9] *See, e.g., Hearings Before the Senate Committee on Environment and Public Works*, 99th Cong., 1st Sess. (1985) (statement of Lee M. Thomas, Administrator, U.S. Environmental Protection Agency); *Acid Rain, 1984: Hearings Before the Senate Committee on Environment and Public Works*, 98th Cong., 2d Sess. 9, 19 (1984) (testimony of William D. Ruckelshaus, Administrator, U.S. Environmental Protection Agency); The State of the Union Address by the President of the United States, *reprinted in* 130 Cong. Rec. H145 (daily ed. Jan. 25, 1984).

[10] National Acid Precipitation Assessment Program, "Press-Release—Government Scientists Report on Acid Rain Research Progress" 4 (February 25, 1987).

I. ORIGINS OF THE § 115 SUIT

Section 115 of the Clean Air Act[11] is entitled "International Air Pollution." Section 115(a) provides that:

> Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency[,] has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which *may reasonably be anticipated to endanger* public health or welfare in a foreign country[,] or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature[,] the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate. [Emphasis added]

Section 115(c) further provides that "formal notification" shall be issued to governors of states only if the Administrator "determines" that the foreign country provides U.S. citizens "essentially the same rights" as afforded by § 115. Any notification to states issued under this section is to be treated as a notice of SIP deficiency pursuant to § 110(a)(2)(H) of the Act, requiring corrective state action.[12]

The instant litigation has unfolded against the congressional and administrative background described above.

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[11] 42 U.S.C. § 7415 (1982) (hereinafter referred to as "CAA" or "the Act"). For convenience, all further citations will be to sections of the Act. Parallel citations to the U.S. Code are provided in the Table of Authorities.

[12] CAA § 115(b). Section 110(a)(2)(H) of the Act requires state control programs that implement the Clean Air Act (called "state implementation plans" or "SIPs") to provide for revision if the EPA Administrator issues a notice (called a "SIP deficiency notice") that the SIP is "substantially inadequate to meet Clean Air Act requirements." Section 110(c) requires the federal government to revise the SIP if the state fails to cure the deficiency within the time provided in the notice.

In the final days of the Carter Administration, Senator Mitchell of Maine, an unsuccessful proponent of immediate acid deposition controls, wrote then-EPA Administrator Costle to inquire whether § 115 of the existing Clean Air Act could be used to impose controls on substances suspected of contributing to acid deposition.[13]

Administrator Costle responded to Senator Mitchell's inquiry only days before Costle left office.[14] He sent a similar letter to Secretary of State Muskie, and issued a press release.[15] In this correspondence, Administrator Costle stated that a report from an international study group indicated that pollution from the United States and Canada likely contributed to acid deposition in Canada, but that available information did not permit allocation of acid deposition falling in Canada between U.S. and Canadian emission sources.[16] As a result, Administrator Costle made clear that "EPA has not yet deter-

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[13] Letter from George J. Mitchell, Senator from Maine, to Douglas M. Costle, Administrator, U.S. EPA (December 23, 1980), *cited in* Letter from Douglas M. Costle, Administrator, U.S. EPA, to Senator George J. Mitchell (January 13, 1981), Appendix to New York Petition for Writ of Certiorari (February 23, 1987) at A-34 to A-41 (hereinafter cited as "New York App.").

[14] Letter from Costle to Mitchell, New York App. at A-34 to A-41.

[15] Letter from Douglas M. Costle, Administrator, U.S. EPA, to Edmund S. Muskie, Secretary of State (January 13, 1981), New York App. at A-30 to A-33; U.S. EPA Press Release (January 16, 1981).

[16] The October 1980 report by the International Joint Commission (IJC) on "Great Lakes Water Quality," on which the Costle correspondence was based, contained only nine pages of discussion on acid deposition. It observed that "expansion of research programs [is needed] to provide information on the causes, effects and measures for the control of the long range transport of airborne pollutants, especially acid rain" (p. 5), and that "research and monitoring *are required to demonstrate . . . effects*" from acid deposition (p. 53) (emphasis added).

mined which State or States will require notification" under § 115, and informed Senator Mitchell that he would direct his staff to undertake additional analysis to develop information and recommendations on future EPA activity regarding § 115.[17] Administrator Costle also stated that he believed Canadian pollution control laws provided authority for development of emission controls in Canada similar to those that could be developed in the U.S. under § 115.[18]

After Administrator Costle left office, EPA continued its research activities into the causes and effects of acid deposition.[19] All three subsequent EPA Administrators made clear that they did not regard Costle's eleventh-hour statements regarding § 115 as obligating EPA to impose immediate emission controls under § 115.[20] Thus, consistent with the NAPAP legislation, EPA's efforts were devoted to completing necessary research before making decisions on the need for and nature of further emission control programs.

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[17] Letter from Costle to Mitchell at 6, New York App. at A-40.

[18] *Id.* at 4-5, New York App. at A-39. He indicated, however, that whether Canadian law provided "essentially the same rights" would depend upon how that law was implemented at the time EPA developed SIP deficiency notices. *Id.*

[19] This EPA research is part of NAPAP, the results of which are published in annual and other periodic reports. *See, e.g., supra* note 10.

[20] *See supra* note 9; *see also* Letter from Anne M. Gorsuch, Administrator, U.S. EPA, to James A. Rhodes, Governor of the State of Ohio (Sept. 22, 1981); Letter from James A. Rhodes, Governor of the State of Ohio, to Anne M. Gorsuch, Administrator, U.S. EPA (June 17, 1981); Letter from Defendant William D. Ruckelshaus in Response to Notice of Intent to Sue (March 13, 1984). *Cf.* Cincinnati Gas & Electric Co. v. EPA, Nos. 81-1311, *et al.* (D.C. Cir. 1981) (per curiam) (dismissing petitions to review the Costle statements filed by the State of Ohio and two electric utility companies because these petitions sought "review of action that is not ripe for judicial decision at this time.").

II. THE DISTRICT COURT SUIT

By mid-1984, EPA and Congress' position on the need to complete basic research before making decisions on regulatory programs was clear. Against this background, New York and several other Northeastern States and environmental groups [hereinafter referred to jointly as "New York"] responded to what they perceived as a need for immediate acid deposition emission controls *not* with a petition for rulemaking, but with a suit in the United States District Court for the District of Columbia to compel regulation of acid deposition under § 115.[21]

The New York suit was filed on March 20, 1984, over four years after the Costle correspondence. In that suit, New York alleged that former Administrator Costle, in writing these letters, bound subsequent EPA Administrators to issue SIP deficiency notices that would require states to reduce emissions to eliminate harmful pollution in Canada.[22] According to New York, this alleged duty to issue SIP deficiency notices was enforceable in the District Court under § 304(a)(2) of the Clean Air Act, which gives those courts jurisdiction to compel "the Administrator to perform any act or duty . . . which is *not discretionary* with the Administrator."[23]

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[21] *See* Notice of Intent to Sue, Interstate and International Air Pollution, filed by New York, *et al.* (January 12, 1984).

[22] *See* Complaint of New York, *et al.* at 10-12, in New York v. Thomas, 613 F. Supp. 1472 (D.D.C. 1985), *rev'd*, 802 F.2d 1443 (D.C. Cir. 1986); *see also* Brief for Appellees New York, *et al.* at 4, in Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986) ("the Costle determinations . . . established a *continuing obligation* to issue § 115 notices. . . .") (emphasis added); Brief of Intervenors-Appellees Her Majesty the Queen in Right of Ontario, *et al.* at 13, in Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986) ("Costle's determinations were intended to bind . . . subsequent EPA Administrators.").

[23] CAA § 304(a)(2) (emphasis added); *see* Complaint of New York, *et al.*, *supra* note 22 at 10.

EPA and Industry Intervenors Alabama Power Co., *et al.* and the National Coal Association moved to dismiss New York's complaint, *inter alia*, on the grounds that the district court had no jurisdiction under § 304 (a) (2) of the Act, since the Costle correspondence did not create a nondiscretionary duty.[24] The district court rejected this argument, holding that former Administrator Costle's four-year old correspondence should be treated as "formal" determinations that bound EPA to issue SIP deficiency notices.[25]

In response to EPA's observation that § 115 did not indicate, and that the Agency did not have sufficient information to determine, what states should receive SIP deficiency notices, the court told EPA how to implement § 115. According to the district court, "the language of Section 115 *already indicates* that a reduction in emissions will abate the deleterious effects of *midwestern* pollution on public health and welfare in Canada." [26]

III. THE COURT OF APPEALS DECISION

In October 1985, the district court decision was appealed to the United States Court of Appeals for the District of Columbia Circuit by EPA and Industry Intervenors Alabama Power Co., *et al.*, and the National Coal Association. The province of Ontario intervened on behalf of New York, and the states of Ohio, West Virginia, and Kentucky intervened on behalf of EPA.

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[24] *See* Defendant's Motion to Dismiss or in the Alternative for Summary Judgment on Count II (May 30, 1984); Motion of Intervenors to Dismiss Plaintiffs' § 115 Claim for Lack of Subject Matter Jurisdiction (May 30, 1984).

[25] New York v. Thomas, 613 F. Supp. 1472, 1481-86 (D.D.C. 1985), New York App. at A-20 to A-29.

[26] *Id.* at 1480, New York App. at A-19 (emphasis added). It should be noted that neither the language of § 115 nor its legislative history ever mention "mid-western pollution," much less relate that pollution to harm in Canada.

After briefing and argument, a unanimous panel of the D.C. Circuit (consisting of Judges Wright, Mikva, and Scalia) reversed the district court decision. In his opinion for the panel, Judge Scalia applied the basic principle of administrative law that "a statement of 'future effect designed to implement . . . law or policy' [footnote omitted] . . . [is] a rule."[27] Based upon this straightforward principle, Judge Scalia reached the unsurprising conclusion that:

> [I]f Administrator Costle's findings left the EPA no alternative but to issue SIP notices ultimately causing the termination or restriction of the operations of many utilities and manufacturers—if they *forced* the EPA to take direct and substantial regulatory actions—they could not be promulgated without notice-and-comment procedures.
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> * * * *
>
> [B]ecause the findings were issued without notice and comment, they cannot be the basis for the judicial relief appellees seek. *How and when the agency chooses to proceed* to the stage of notification triggered by the findings *is within the agency's discretion and not subject to judicial compulsion* [as a nondiscretionary duty under § 304(a)(2) of the Act].[28]

ARGUMENT

Section 304(a)(2) of the Act gives district courts jurisdiction to order EPA to take action that is "*not discretionary* with the Administrator." In this case, the district court held that the Costle letters created a nondiscretionary duty to issue SIP deficiency notices pursuant to § 115 of the Act. The D.C. Circuit, however, disagreed. It held that the Costle correspondence did not

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[27] Thomas v. New York, 802 F.2d 1443, 1446-1447 (D.C. Cir. 1986), New York App. at A-5 to A-6.

[28] *Id.* at 1447-48, New York App. at A-7 to A-8 (emphasis in original and added).

legally obligate future EPA Administrators to implement § 115, and therefore ordered dismissal of the case.

New York and Ontario attempt to support their petitions by arguing that there is an immediate need for acid deposition controls that will not be satisfied without action by the judiciary.[29] This argument is misplaced in a petition for certiorari.

The acid deposition issue has been and is being debated in Congress. It is the subject of discussions with Canada. It is being addressed by federal agencies, who are spending millions of research dollars to identify whether and, if so, what regulation is needed.[30] New York and Ontario's policy arguments for immediate acid deposition controls are for Congress or EPA, not for this Court on certiorari.

Otherwise, New York and Ontario's petitions simply reargue the merits of the case decided below. Only in exceptional cases will this Court grant certiorari to review the correctness of a lower court's decision.[31] This clearly is not such a case. The issue resolved by the court of appeals is not novel and the decision below is not in

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[29] *See* Petition for Certiorari of New York, *et al.* (February 23, 1987) at 7-12 (hereinafter "New York Petition"); Petition for Certiorari of Ontario, *et al.* (February 23, 1987) at 11-12 (hereinafter "Ontario Petition").

[30] *See supra* p. 4.

[31] *See* Ross v. Moffitt, 417 U.S. 600, 616-617 (1974) ("this Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *see also* R. Stern and E. Gressman, Supreme Court Practice § 4.18 (5th Ed. 1978) (this Court "is not primarily concerned with the correction of errors in lower court decisions. . . . Hence the Court generally will not grant certiorari just because the decision below may be erroneous." (footnotes omitted)); S.Ct. Rule 17 (certiorari may be granted where "an important question of federal law" has been decided which "has not been . . . settled by this court.").

conflict with other precedent. Accordingly, no review of the merits of the D.C. Circuit opinion is appropriate.

I. FINDINGS DISEMBODIED FROM RULES CANNOT BIND AN AGENCY

New York and Ontario argued below that the Costle correspondence legally obligated subsequent EPA Administrators to issue § 115 SIP deficiency notices calling for emission reductions. The D.C. Circuit rejected New York's argument that informal correspondence can give rise to an enforceable legal obligation to undertake future regulatory action, holding that statutory findings expressed in letters do not bind subsequent EPA Administrators unless those findings are also embodied in a rule requiring the Agency to implement the applicable statutory provision.[32] As Judge Scalia observed, if "Costle's findings left the EPA no alternative but to issue SIP notices . . .—if they *forced* the EPA to take direct and substantial regulatory actions—they could not be promulgated without notice-and-comment procedures." [33]

In a "now-you-see-it-now-you-don't" argument, New York and Ontario suggest in their petitions for certiorari that an informal statement by an EPA Administrator can create legal obligations akin to a "rule" (i.e., that it can establish an obligation of "future effect") for purposes of § 304(a)(2) jurisdiction, but need not be considered a "rule" for purposes of the Administrative Procedure Act's (APA) notice and comment requirements.[34] This attempted sleight-of-hand does not withstand analysis.

Ontario first argues that the binding effect of the Costle correspondence "arises solely from Section 115 of

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[32] Thomas v. New York, 802 F.2d at 1447-48, New York App. at A-7 to A-8.

[33] *Id.* at 1447, New York App. at A-7 (emphasis in original).

[34] *See* New York Petition at 17; Ontario Petition at 15, 16.

the Clean Air Act."[35] According to Ontario, once any EPA Administrator "has *'reason to believe'* that endangerment exists" in another country, the Agency has an immediate and "binding duty to issue SIP [deficiency] notices."[36] Ontario finds "no statutory requirement that the Administrator's belief [concerning endangerment] be expressed in written form or communicated to anyone" before the Agency becomes bound to issue SIP deficiency notices in the future.[37] In sum, Ontario contends that through the "reason to believe" language, Congress invested "beliefs" with the power to create future legal obligations, and did not intend that rulemaking precede the creation of these obligations.

Acceptance of Ontario's argument would mean that whenever the Administrator expressed himself in a preliminary or informal manner regarding findings under any statutory provision containing the word "shall," he would be found to have created a nondiscretionary duty forcing the Agency to act.[38] Under Ontario's theory,

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[35] Ontario Petition at 16.

[36] *Id.* at 6, 16 (emphasis added).

[37] *Id.* at 6.

[38] Numerous provisions of the Clean Air Act provide that the Administrator "shall" take specific action after making discretionary findings or performing discretionary analyses. For example, under § 110(a)(3)(A) the Administrator "shall" approve SIP revisions if he finds that they meet the requirements of § 110(a)(2). Under other provisions, the Administrator "shall" delegate various types of enforcement authority to states if he finds state procedures are adequate (*see, e.g.*, CAA §§ 111(c), 112(d)); he "shall" hold hearings on reasonably available control technology for nonferrous smelters if he finds orders issued by states to be inadequate (*see* CAA § 119(a)(1)(B)); he "shall" prescribe regulations for onboard hydrocarbon control equipment if he finds that such systems are feasible and desirable (*see* CAA § 202(a)(6)); and he "shall" set vehicle emission test standards if he finds that such standards are in accordance with good engineering practice (*see* CAA § 207(b)(1)). Other sections provide that regulations "shall" con-

whenever the Administrator proposed a rule, appeared before Congress, held a press conference, wrote a letter, or even was overheard in the hallways of EPA headquarters expressing a belief regarding a Clean Air Act regulatory finding, the Agency would be legally obligated to take specific, future regulatory action in accordance with those informal or preliminary statements, without having provided any opportunity for prior public notice and comment.[39]

The APA provides that a "rule" is "an agency statement of . . . future effect designed to implement . . . law or policy," and requires that any rule be preceded by notice and comment.[40] In light of these requirements, for an agency to impose on itself a future obligation to implement a regulatory provision like § 115, the agency must adopt a rule after notice and comment. Congress in § 115 did not excuse the Agency from these requirements of

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form to the Administrator's exercise of judgment on specific issues. *See, e.g.*, CAA § 111(a) (standards of performance for new sources); § 112(b)(1)(B) (national emission standards for hazardous air pollutants).

[39] *Compare* FTC v. Standard Oil of California, 449 U.S. 232, 241-42 (1980) (the FTC's "adverment of 'reason to believe' that Socal was violating the [FTC] act is not a definitive statement of position . . . [but rather] represents a threshold determination" that is not reviewable until the Agency takes final action. A contrary holding "denies the Agency an opportunity to correct its own mistakes and to apply its expertise."); Public Citizen Health Research Group v. FDA, 740 F.2d 21, 30-31 (D.C. Cir. 1984) (the district court properly refused to bind the agency to "preliminary findings" contained in proposed rulemaking notice and statements of the agency head, since to do so would deny the agency the "full opportunity to apply its expertise and to correct errors or modify positions.").

[40] Administrative Procedure Act, 5 U.S.C. §§ 551(4), 553(c) (1982).

the APA.[41] If there were any doubt as to the applicability of the APA here, it is eliminated by § 307(d)(1) of the Act, which makes clear that the APA applies to provisions, like § 115, that are not subject to the more elaborate procedural provisions of § 307(d) of the Act.[42] Accordingly, if the Administrator of EPA wishes to impose on the Agency an obligation to take future regulatory action under § 115, he must first comply with the notice and comment requirements of the APA.[43]

Petitioner New York suggests that the Costle correspondence was binding (for purposes of § 304(a)(2) jurisdiction) but yet not binding (for purposes of the APA notice and comment requirements), since EPA could revoke Costle's statements concerning endangerment

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[41] Indeed, the "endangerment" concept used in § 115 has traditionally been viewed as calling for the exercise of rulemaking discretion. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 20-28 and nn.23, 37, 56 (D.C. Cir.) (EPA decision under § 211 of Clean Air Act that automobile lead emissions "will endanger" the public health calls for the exercise of policy judgment and risk assessment), *cert. denied*, 426 U.S. 941 (1976). The exercise of discretion to implement a statutory term such as "endangerment," of course, is what the rulemaking process is all about. *See* Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962) (an agency's "[e]xpert discretion is the lifeblood of the administrative process").

[42] Section 307(d) provides special procedures for certain Clean Air Act proceedings. Regulatory provisions that are not specifically listed in § 307(d)(1), like § 115, are covered by the APA procedural requirements. CAA § 307(d)(1)(N).

[43] In any event, the Agency has *not* interpreted § 115 to mean that an informal or even uncommunicated expression of "belief" as to endangerment will bind the Agency to issue SIP deficiency notices. Rather, a succession of EPA Administrators has interpreted § 115 as *not* raising an informal expression of views to the level of a rule. *See supra* note 20. Under this Court's decision in Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843, *reh'g denied*, 468 U.S. 1227 (1984), the Agency's interpretation of its enabling statute must be afforded substantial deference.

and reciprocity during a subsequent rulemaking to define emission reductions.[44] This argument also misses the point.

It is well-established that agencies have broad discretion to set priorities and schedules for action.[45] This discretion can be removed by Congress, for example, where it sets specific statutory deadlines for action.[46] There are no statutory deadlines in § 115, however. Thus, if Administrator Costle wished to remove the Agency's discretion to determine whether and when to implement § 115, he needed to adopt a rule in accordance with the APA. Accordingly, given Costle's failure to issue his findings in the context of a rule designed to compel action under § 115 by a specific date, "[h]ow and when the agency chooses to proceed to the stage of notification [under § 115(b)] . . . is within the agency's discretion." [47]

As a result, even if, as New York now contends,[48] the Agency could revoke Costle's preliminary findings through

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[44] New York Petition at 17.

[45] *See, e.g.*, Heckler v. Day, 467 U.S. 104, 119 (1984); NRDC v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

[46] *See, e.g.*, CAA §§ 107(c), 108(a)(1), 109(a)(1), 110(a)(2), 110(h), 111(b)(1)(A), 111(b)(1)(B), 112(b)(1)(B), 123(c), 166(a).

[47] Thomas v. New York, 802 F.2d at 1448, New York App. at A-8. New York and Ontario's contention that the lower court's decision would gut the citizen suit provisions of the Clean Air Act and other environmental statutes, *see* New York Petition at 20-22; Ontario Petition at 13, is without merit. Many of the statutory provisions cited by New York and Ontario contain deadlines for agency action which can be enforced through citizen suits. For those provisions that do not contain deadlines, judicial intervention in the administrative process based upon informal expressions of belief should be discouraged.

[48] It should be noted that New York argued below that the Agency was bound by the Costle correspondence to issue SIP

subsequent rulemaking, this would not diminish in any way the importance of following rulemaking procedures before taking action that *obligated* the Agency to initiate *future* rulemakings. In other words, Administrator Costle could remove the discretion given EPA by Congress over scheduling and the setting of regulatory priorities, thereby forcing EPA to undertake rulemaking, *only if* he adopted, in accordance with the APA, a rule requiring such action.

In sum, the fundamental flaw in Petitioners' theory is their failure to understand that the expression of a belief—whether in a proposed rule, in informal correspondence, or in a statement to the press—is not the same as an agency exercising its discretion to create a future legal obligation. As Judge Scalia recognized, discretion is exercised, and binding action is taken, only when rights are resolved at the conclusion of a rulemaking proceeding.[49] No such proceeding was conducted in this case. Accordingly, New York and Ontario's argument that the Costle correspondence could create a legal obligation for EPA to undertake regulatory action under § 115 is wrong on the merits, and provides no basis for certiorari.

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deficiency notices requiring emission reductions, *not* that EPA was required to initiate a rulemaking to determine whether such notices should be issued. Based upon New York's argument below, the district court ordered EPA to "comply with [its] mandate . . . by formally notifying the governors of any state in which such emissions originate" to reduce emissions. 613 F. Supp. at 1486, New York App. at A-43. Since New York's argument described above was not presented below, it cannot be presented on appeal. EEOC v. FLRA, 54 U.S.L.W. 4408, 4409 (April 29, 1986) (certiorari dismissed as improvidently granted because issue not presented below).

[49] Thomas v. New York, 802 F.2d at 1447-48, New York App. at A-7 to A-8; *see supra* note 39.

II. REQUIRING NOTICE AND COMMENT BEFORE ISSUANCE OF A RULE DOES NOT CONFLICT WITH VERMONT YANKEE

New York and Ontario contend in their petitions that Judge Scalia wrongly concluded that rulemaking procedures are necessary before an agency can legally obligate itself to undertake regulatory action,[50] and that this holding violates this Court's *Vermont Yankee* decision.[51] This argument is without merit.

In *Vermont Yankee*, this Court rejected the D.C. Circuit's attempt to "develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking," [52] since there was "nothing in the APA, NEPA, the circumstances of this case, [or] the nature of the issues being considered" that either required or authorized such procedures.[53] By contrast, in this case, Judge Scalia has not created "new procedures" to implement his view of the Clean Air Act, but rather has merely restated the law regarding the statutorily mandated rulemaking procedures of the APA.

The court below did not, as Petitioners argue,[54] hold that EPA must conduct two notice and comment rulemakings in order to implement § 115. The D.C. Circuit only held that, if the Administrator wishes to implement § 115 in two stages—the first stage being prom-

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[50] *See, e.g.*, Ontario Petition at 17 (notice and comment at any other stage of a § 115 proceeding is "totally unnecessary"); *see also* New York Petition at 15-16, 20 (notice and comment at any other stage of a § 115 proceeding would be "merely redundant to that which would have been later afforded").

[51] *See* New York Petition at 17-20; Ontario Petition at 17.

[52] NRDC v. NRC, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[53] *Vermont Yankee*, 435 U.S. at 548.

[54] *See* New York Petition at 17-20; Ontario Petition at 17.

ulgations of findings that bind the Agency to conduct the second stage, which would be issuance of § 115 SIP deficiency notices—the Administrator must conduct two rulemakings. If the Administrator wishes to implement § 115 in one stage—which is the usual way provisions like § 115 are implemented—[55] the Administrator can issue a notice of proposed rulemaking containing proposed § 115 findings and proposed § 115 SIP deficiency notices. After receiving comments, he can promulgate final deficiency notices accompanied by final findings.[56]

In sum, the lower court's holding is a straightforward application of the APA requirement that any "statement of . . . future effect designed to implement . . . law or policy" (i.e., a "rule")[57] must be preceded by notice and

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[55] *See* Thomas v. New York, 802 F.2d at 1446, New York App. at A-5.

[56] New York simply misreads National Asphalt Paving Ass'n v. Train, 539 F.2d 775 (D.C. Cir. 1976), as well as the other decisions cited at pages 15-16 of its petition, in suggesting to the contrary. For example, in *National Asphalt*, the D.C. Circuit addressed § 111 of the Clean Air Act, which provides that if EPA finds that a source category is a "significant contributor" to pollution, it must propose emission control standards for that source category within 120 days. *See* 539 F.2d at 779. In addressing industry's challenge to the "significant contributor" finding, the D.C. Circuit rejected the government's suggestion "that an opportunity to comment on . . . [this finding] is not required at all," finding that both "[*the Clean Air Act and*] *section 4 of the APA require*[] *that interested persons have a meaningful opportunity to comment on that part of the rule* [i.e., the "significant contributor" finding]." *Id.* at 779 n.2 (emphasis added and in original). Since the "significant contributor" finding was issued simultaneously with the proposed emission standards as a "proposed" rule, however, the Court found that notice and comment on this proposal could take place concurrently with notice and comment on the proposed emission standard. *Id.* In the instant case, of course, New York and Ontario do not seek, nor has EPA undertaken, a concurrent rulemaking on proposed "endangerment" and "reciprocity" findings *and* on proposed emission controls.

[57] 5 U.S.C. § 551(4).

comment. Since former Administrator Costle's eleventh-hour correspondence failed to satisfy this APA requirement, this correspondence could not establish a legally binding future obligation to issue § 115 SIP deficiency notices. Accordingly, the decision of the court below does no more than confirm the requirements of the APA and in no way conflicts with *Vermont Yankee*.

CONCLUSION

For the foregoing reasons, Respondents Alabama Power Co., *et al.*, National Coal Association, and the States of Ohio, Kentucky, and West Virginia hereby request that the petitions for certiorari in case numbers 86-1373 and 86-1374 be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF INDIVIDUAL ELECTRIC UTILITIES

Alabama Power Company
(subsidiary of The Southern Company)

subsidiaries:

Alabama Property Company
Columbia Fuels, Inc.

affiliate:

Southern Electric Generating Company

Appalachian Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Appalachian Coal Company
Central Coal Company
Central Operating Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
Southern Ohio Coal Company
West Virginia Power Company
Cedar Coal Company

Arkansas Power & Light Company
(controlled by Middle South Utilities, Inc.)

subsidiary:

Associate Natural Gas Company

affiliates:

Systems Fuels, Inc.
The Arklahoma Corp.

Baltimore Gas and Electric Company

subsidiaries:

Resource and Property Management, Inc.
Safe Harbor Water Power Corp.
Diversified Holdings, Inc.

subsidiaries:

Baltimore Biogas, Inc.
Baltimore Capitol Resources, Inc.

Boston Edison Company

Carolina Power & Light Company

subsidiaries:

Capital Corporation
Leslie Coal Mining Company

affiliate:

Carolinas-Virginia Nuclear Power Ass'n, Inc.

Central and South West Corporation

subsidiaries:

Central Power and Light Company

affiliate:

Central and South West Fuels, Inc.

Public Service Company of Oklahoma

affiliate:

Central and South West Fuels, Inc.

subsidiaries:

Transok Pipe Line Co.
Ash Creek Mining Co.

Transok, Inc.

Southwestern Electric Power Company

subsidiary:

Southwest Arkansas Utilities Corp.

affiliate:

Arklahoma Corp.
Central and South West Fuels, Inc.

West Texas Utility Company

subsidiary:

CSR Services, Inc.

affiliate:

Central and South West Fuels, Inc.

Central and South West Services, Inc.

CSW Financial, Inc.

CSW Energy, Inc.

Central and South West Fuels, Inc.

Central Hudson Gas and Electric Corporation

subsidiaries:

Phoenix Development Company, Inc.
Cruger Development Corporation
Greene Point Development Corporation
Central Hudson Enterprises Corp.
CH Resources, Inc.

Central Illinois Light Company

subsidiaries:

CILCO Exploration and Dev. Co.
CILCO Energy Corporation

Central Illinois Public Service Company

affiliate:

Electric Energy, Inc.

The Cincinnati Gas and Electric Company

subsidiaries:

Union Light, Heat and Power Co.
West Harrison Gas & Electric Co.
Miami Power Corp.
Lawrenceburg Gas Co.
Lawrenceburg Gas Transmission Corp.
Tri-State Improvement Co.
YGK, Inc.

The Cleveland Electric Illuminating Co.

subsidiaries:

The Ceico Co.
CCO Co.
Dynamic Energy Ventures, Inc.

Columbus and Southern Ohio Electric Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Colomet, Inc.
Simco, Inc.

Commonwealth Edison Company

subsidiaries:

Commonwealth Edison Co. of Indiana, Inc.
Chicago and Illinois Midland Railway Co.
Cotter Corp.
Commonwealth Research Corp.
Edison Development Canada, Inc.
Edison Development Co.
Concomber, Ltd.

Consolidated Edison Company of New York, Inc.

Consumers Power Company

subsidiaries:

Michigan Gas Storage Company
Northern Michigan Exploration Company

Michigan Utility Collection Service, Inc.
Plateau Resources Limited
Utility Systems, Inc.
Consumers Power Finance, N.V.
Conar Corp.

The Dayton Power and Light Company

subsidiaries:

DP&L Community Urban Redevelopment Corp.
Miami Valley Development Company
UCON Inc.
ZMS Inc.

Delmarva Power & Light Company

subsidiaries:

Delmarva Power & Light Co. of Maryland
Delmarva Power & Light Co. of Virginia
Delmarva Energy Co.
Delmarva Industries, Inc.

The Detroit Edison Company

subsidiaries:

Edison Illuminating Company
Midwest Energy Resources Company
Peninsular Electric Light Company
St. Clair Edison Company
Washtenaw Light & Power Company
Essex County Light
St. Clair Energy Corp.
Utility Technical Services, Inc.

Duke Power Company

subsidiaries:

Mill-Power Supply Co.
Crescent Land & Timber Corp.
Eastover Land Co.
Eastover Mining Co.

Wateree Power Co.*
Catawba Manufacturing and Electric Power Co.*
Western Carolina Power Co.*
Caldwell Power Co.*

Florida Power Corporation
(controlled by Florida Progress Corporation)

Florida Power & Light Company

subsidiaries:

Southern Power Co.*
Greenville Gas and Electric Light and Power Co.*
Duke Power Overseas Finance, N.V.
Fuel Supply Service, Inc.
Land Resources Investment Company
W. Flagler Investment Corp.

Georgia Power Company
(subsidiary of The Southern Company)

subsidiary:

Piedmont Forrest Co.

affiliate:

Southern Electric Generating Company

Gulf Power Company
(subsidiary of The Southern Company)

Gulf States Utilities Company

subsidiaries:

Varibus Corporation
Prudential Drilling Company

Houston Lighting & Power Company
(controlled by Houston Industries, Inc.)

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* Inactive.

Illinois Power Company

subsidiaries:

IP Inc.
IPF Co., N.V.
Illinois Power Fuel Company

affiliate:

Electric Energy Inc.

Indiana & Michigan Electric Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Castlegate Coal Company, Inc.
Indiana & Michigan Power Company
Price River Coal Company
Blackhawk Coal Company

Indianapolis Power & Light Company
(controlled by IPALCO Enterprises, Inc.)

Iowa-Illinois Gas and Electric Company

subsidiary:

Iowa-Illinois Energy Co.

Iowa Public Service Company
(subsidiary of Midwest Energy Co.)

subsidiaries:

Cimmred, Inc.
Energy Development Company
Energy Reserves, Inc.
Centennial Coal, Inc.
Midwest Energy Co.
Midwest Energy Service Co.

Kansas City Power and Light Company

Kentucky Power Company
(controlled by American Electric Power Company, Inc.)

Kentucky Utilities Company

subsidiary:

Old Dominion Power Company

affiliate:

Electric Energy, Inc.

Louisiana Power & Light Company
(controlled by Middle South Utilities, Inc.)

Madison Gas and Electric Company

subsidiaries:

MG&E Nuclear Fuel Inc.
MAGAEL Inc.
MAGAEL Material Resources, Inc.

Mississippi Power Company
(subsidiary of The Southern Company)

Mississippi Power & Light Company
(controlled by Middle South Utilities, Inc.)

subsidiaries:

The Light, Heat & Water Company of Jackson *
Jackson Gas Light Company*
Jackson Light & Traction Company*

affiliate:

Systems Fuels, Inc.

Monongahela Power Company
(controlled by Allegheny Power System, Inc.)

subsidiary:

Allegheny Pittsburgh Coal Company

affiliate:

Allegheny Generating Co.

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* Inactive.

Montaup Electric Company

New England Power Company
(controlled by New England Electric System)

affiliates:

Yankee Atomic Electric Co.
Connecticut Yankee Atomic Power Co.
Vermont Yankee Nuclear Power Co.
Maine Yankee Atomic Power Co.

New Orleans Public Service, Inc.

subsidiary:

Systems Fuels, Inc.

Northern Indiana Public Service Company

subsidiaries:

Shore Line Shops, Incorporated
NIPSCO Exploration Co.
NIPSCO Fuel Co., Inc.
Northern Indiana Public Service Finance, N.V.

Ohio Edison Company

subsidiaries:

Pennsylvania Power Co.
Ohio Edison Finance, N.A.

Ohio Power Company
(controlled by American Electric Power Company, Inc.)

subsidiaries:

Central Coal Company
Central Ohio Coal Company
Central Operating Company
Ohio Electric Company
Southern Ohio Coal Company
Windsor Power House Coal Company
Cardinal Operating Co.
Beech Bottom Power Co., Inc.

Ohio Valley Electric Corporation

subsidiary:

Indiana-Kentucky Electric Corp.

Oklahoma Gas and Electric Company

subsidiary:

Arklahoma Corporation

Pennsylvania Electric Company

subsidiaries:

Nineveh Water Co.
Waverly Electric Light & Power Co.

Pennsylvania Power Company
(controlled by Ohio Edison Company)

Pennsylvania Power & Light Co.

subsidiaries:

Pennsylvania Coal Resources Corp.

subsidiary:

Pennsylvania Mines Corp.

subsidiaries:

Tunnelton Mining Co.
Greene Manor Coal
Rushton Mining Co.
Greene Hill Coal Co.
Oneida Mining Co.

Interstate Energy Co.

Hershey Electric Company

Service Development Company

Safe Harbor Water Power Corp.

Realty Company of Pennsylvania

subsidiaries:

Interstate Energy Co.
BDW Corp.

LCA Leasing Corp.
Lady Jane Colleries, Inc.

affiliates:

The Arcadia Company, Inc.
Safe Harbor Water Power Co.

The Potomac Edison Company
(controlled by Allegheny Power System, Inc.)

subsidiaries:

Allegheny Pittsburgh Coal Company
Allegheny Generating Company

Potomac Electric Power Company

subsidiaries:

Potomac Electric Finance N.V.
PEPCO Enterprises, Inc.
Potomac Capital Investment Corp.

Public Service Company of Indiana, Inc.

Public Service Electric and Gas Company

subsidiaries:

Energy Development Corp.

subsidiary:

Gasdel Pipeline System, Inc.

PSE&G Research Corp.
Energy Terminal Services Corp.
Energy Pipeline Corp.
EASCOGAS LNG, Inc.
Transport of New Jersey

subsidiaries:

Maplewood Equipment Co.
Private Reinvestment Capital Corp.

PSE&G Overseas Finance N.V.
Mulberry Street Urban Renewal Corp.

Salt River Project

Southern California Edison Company

subsidiaries:

Associated Southern Investment Co. (ASIC)
Electric Systems Company
Conservation Financing Corp.
Energy Services Inc. Non-Utility Corp.
Calabasas Park Company (CPC)
Calabasas Communication Company
California Electric Power Co.
Palo Verde Uranium Venture
Southern Surplus Realty Company
Calabasas Park Company, Inc.
Southern California Edison Finance Co., N.V.
Mono Power Company (Calif.)
Mono Power Company (Bolivia)
Mono Power Company (Malaysia)
Mono Power Company (Nicaragua)
Mono Power Company (Peru)
Mono Power Company (Italy)
Union Pacific Company
Southern Sierra Energy Co.
Bear Creek Uranium Company

Tampa Electric Company
(controlled by TECO Energy, Inc.)

subsidiaries:

Tampa Bay Industrial Corp.
Mid-South Towing Company
Electro-Coal Transfer Corp.
Gulfcoast Transit Co.
Southern Marine Management Corp.
Cal-Glo Coal, Inc.

Texas Utilities Generating Company
(subsidiary of Texas Utilities Company)

Toledo Edison Company

Tucson Electric Power Company

subsidiaries:

Western Coal Company
Alamito Co.
Escquada Leasing Co.
Valencia Energy Co.
Rincon Investing Co.
Rincon Securities, Inc.

Union Electric Company

subsidiaries:

Union Colliery Company
Missouri Power & Light Company
Missouri Edison Company
Missouri Utilities Company

affiliate:

Electric Energy, Inc.

Virginia Electric and Power Company
(controlled by Dominion Resources, Inc.)

subsidiaries:

Laurel Run Mining Company
Virginia Nuclear, Inc.
Dominion Exploration, Inc.

West Penn Power Company
(subsidiary of Allegheny Power System, Inc.)

subsidiaries:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Beech Bottom Power Company, Inc.
West Virginia Power & Transmission Co.

subsidiary:

West Penn West Virginia
Water Power Co.

Wisconsin Electric Power Company

subsidiaries:

Wisconsin Natural Gas Company
Wisconsin Michigan Power Company

subsidiary:

Badger Service Company

Wisconsin Power and Light Company

subsidiaries:

South Beloit Water, Gas and Electric Co.
Wisconsin Power and Light Nuclear Fuel, Inc.
NUFUS Resources, Inc.
Wisconsin Mobile Telephone Company, Inc.
Windworks, Inc.
Wisconsin Mobile Telephone, Inc.
Residuals Management Technology, Inc.

affiliate:

Wisconsin River Power Company

Wisconsin Public Service Corporation

affiliates:

Wisconsin River Power Company
Wisconsin Valley Improvement Company
Delores Bench General Partner, Inc.